No. 501

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No.

HUGHES TOOL COMPANY, *Petitioner,*

v.

TRANS WORLD AIRLINES, INC., and THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, *et al., Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Hughes Tool Company ("Toolco") prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review the judgment of said Court entered June 2, 1964 affirming a dismissal with prejudice, in the absence of

a hearing on the merits and as a sanction under Rule 37, Fed. R. Civ. P., of certain counterclaims, which seek damages amounting to $366 million and other relief, filed by Toolco on its own behalf and derivatively on behalf of Trans World Airlines, Inc. ("TWA") against respondent TWA, plaintiff below, and respondents The Equitable Life Assurance Society of the United States ("Equitable"), Metropolitan Life Insurance Company ("Metropolitan"), Irving Trust Company ("Irving"), Ernest R. Breech ("Breech"),[1] Dillon, Read & Co., Inc. ("Dillon, Read"), Ben-Fleming Sessel ("Sessel"), James F. Oates, Jr. ("Oates"), Harry C. Hagerty ("Hagerty"), and Charles C. Tillinghast ("Tillinghast"), additional defendants on the counterclaims below.

OPINION BELOW.

The District Court entered no opinion on the dismissal with prejudice of the counterclaims but ordered their dismissal for the reasons set forth in its decision relating to the entry of an order for a default judgment on the complaint.[2] The opinion relating to the complaint is reported at 32 F.R.D. 604 and said opinion and the order thereon are printed in Appendix A hereto, p. 1a. The opinion of the Court of Appeals is reported at 332 F.2d 602 and is printed in Appendix B hereto, p. 7a.

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[1] Breech was not a party to the appeal before the Court of Appeals.

[2] Proceedings relating to the complaint are the subject of a separate petition for certiorari filed on August 31, 1964, captioned "Hughes Tool Company and Raymond M. Holliday, Petitioners v. Trans World Airlines, Inc., Respondent", No. 443.

JURISDICTION

The judgment of the Court of Appeals was entered on June 2, 1964 (B533).[3] Rehearing and rehearing in banc were denied on July 6, 1964 (B533). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the due process requirements of the Fifth Amendment or the accepted course of judicial procedure are violated when, under Rule 37, Fed. R. Civ. P., a default judgment is entered dismissing counterclaims with prejudice where:

(a) petitioner's refusal to proceed on the counterclaims was based on serious questions as to the District Court's primary jurisdiction arising out of this Court's decision in *Pan American World Airways, Inc.* v. *United States,* 371 U.S. 296, decided while the case was pending in the District Court; petitioner had filed an appropriate complaint before the Civil Aeronautics Board, but the District Court declined to stay proceedings on the counterclaims pending final action by the Board;

(b) the default judgment was entered and affirmed on the basis of petitioner's conduct relating to discovery on the complaint and not on the counterclaims;

(c) there was no showing in the record and no findings were made by the District Court that the

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[3] References to "(B)" are to Volume III of the Record before the Court of Appeals which consists of "Appendix to Joint Brief of Additional Defendants-Appellees and to Brief of Plaintiff-Appellee" filed in this case (No. 28406) with the Court of Appeals with the proceedings in the Court of Appeals inserted in the back.

evidence the counterclaim defendants sought by a deposition and other discovery was relevant or material to the preparation of a defense to petitioner's counterclaims;

(d) default judgment was ordered without consideration of the appropriateness of a voluntary dismissal of the counterclaims even though petitioner had asked for a stay "or such other relief as may be appropriate," and there was no indication a non-suit would have resulted in prejudice to any party.

2. (a) Should a district court hold in abeyance, rather than dismiss for lack of jurisdiction, a counterclaim alleging conduct in violation of the Federal Aviation Act pending a determination by the Civil Aeronautics Board whether the Act has been violated, particularly where other counterclaims arising out of the same transactions are also stated?

(b) In such circumstances should a district court also hold in abeyance other counterclaims alleging the same course of conduct to have violated the antitrust laws and the common laws pending a determination of the Civil Aeronautics Board?

[redacted]. In addition, there is a question whether, in a case where no notice was given to other stockholders pursuant to the provisions of Rule 23(c) of the Federal Rules of Civil Procedure, may a derivative claim be dismissed "with prejudice" prior to a hearing on the merits and by reason of the imposition of sanctions under Rule 37 against the stockholder asserting the claim?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fifth Amendment of the Constitution provides: "No person shall . . . be deprived of . . . property without due process of law."

The statutory provisions involved are Sections 408 and 414 of the Federal Aviation Act of 1954 (49 U.S.C. § 1378, as amended 1962, and § 1384), Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2), and Section 7 of the Clayton Act (15 U.S.C. § 18).

The Federal Rules of Civil Procedure ("Rules") involved are Rules 37(b)(2)(iii), 37(d) and 41(a), (c) and (d). The above-cited statutory provisions and Rules are reprinted in Appendix C, p. 33a.

STATEMENT OF THE CASE

In December 1960, certain lending institutions, including respondents Metropolitan, Equitable and Irving, insisted as a condition to supplying senior financing for the acquisition of jet equipment by TWA, that petitioner Toolco, the owner of 78% of the stock of TWA, place said stock in a voting trust to be controlled by them (the "Voting Trust").[4]

On June 30, 1961, the new lender-controlled management of TWA directed the filing of a complaint against Toolco, Raymond M. Holliday, an officer and director of Toolco, and Howard R. Hughes ("Hughes"), the sole stockholder of Toolco, but neither an officer nor director thereof since December

[4] The Voting Trust was for a period of 10 years but terminable at Toolco's option by the purchase of certain notes of TWA and the payment of certain other notes plus a premium of up to 22 percent.

1960.[5] The complaint claims that the defendants violated the antitrust laws in connection with Toolco's acquisition and exercise of control over TWA, particularly with respect to the acquisition and financing of aircraft by TWA. It seeks divestiture, damages and other relief (see A1-30).[6]

On February 13, 1962, Toolco filed its answer to this complaint and also filed six counterclaims (A31-84)[7] naming as additional defendants on the counterclaims respondents[8] Equitable, Metropolitan and Irving, certain officers thereof, Dillon, Read, principal financial adviser to TWA, Tillinghast, the president of TWA installed by the lenders, and Breech, Chairman of the Board of Directors of TWA and until January 26, 1962, one of the voting trustees appointed by the lending institutions.

1. The Pleadings

In its counterclaims, Toolco for itself and derivatively on behalf of TWA, seeks $366 million damages and other relief by reason of an alleged course of conduct by the additional defendants by which they wrongfully deprived Toolco of voting control of TWA

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[5] Although named as a party defendant, Hughes was never served.

[6] References to "(A)" are to pages of petitioner's (appellant below) Appendix filed in this action with the Court of Appeals.

[7] Toolco does not seek a review of the decision of the Court of Appeals affirming the granting of summary judgment with respect to Toolco's Sixth Counterclaim. Accordingly, as hereinafter used, "counterclaims" refers to the first five counterclaims.

[8] Respondents other than TWA will hereinafter be referred to as "additional defendants".

and themselves acquired, exercised, maintained and perpetuated control over it. This single course of conduct is alleged to be:

> (a) a violation of the Federal Aviation Act ("Act") in that the additional defendants, or some of them, are persons engaged in a phase of aeronautics who acquired and maintained control of an air carrier without prior approval of the Civil Aeronautics Board (the "CAB" or "Board") as required by Section 408 of the Act (49 U.S.C. § 1378);
>
> (b) a violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2) by reason of a combination and conspiracy to restrain and monopolize trade and commerce in the supplying of financing to air carriers and an acquisition of stock in violation of Section 7 of the Clayton Act (15 U.S.C. § 18); and
>
> (c) a common law conspiracy wrongfully to deprive Toolco of control over TWA and an effort to perpetuate the control of the additional defendants over TWA in violation of applicable state statutes.

Although the counterclaims are divided into five separately stated claims, each of which seeks relief on a different theory, there is alleged only one course of conduct by the additional defendants which damaged both TWA and Toolco, in violation of the antitrust laws and the Act.[9]

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[9] Thus, the First Counterclaim alleges an interference with contractual rights of Toolco by the additional defendants through a course of conduct designed to perpetuate the Voting Trust; the Second re-alleges the facts contained in the First and avers that the conduct of additional defendants Metropolitan, Equitable and

January 25, 1963, almost one year after the counterclaims were filed, replies were served by Equitable (B61-86), Metropolitan (B87-111), Irving and Sessel (B112-148), Oates (R2623-47),[10] and Hagerty (R2599-2622). Dillon, Read replied on February 5, 1963 (B149-176), and TWA and Tillinghast replied on February 11, 1963 (B194-195; B196-204).

2. Events Leading up to Entry of Judgment Dismissing the Counterclaims with Prejudice

(a) Discovery

Shortly after TWA filed its complaint against Toolco in 1961, and about six months prior to the time the counterclaims were filed, Toolco served subpoenas *duces tecum* on a number of witnesses, including the respondents,[11] in order to obtain documents in aid of its discovery with respect to the complaint.

On February 13, 1962, Toolco filed its counterclaims. Immediately thereafter the additional defendants

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Irving in acquiring and maintaining control over TWA without approval of the Board violates Section 408 of the Act since, by reason of the dependence of the major airlines on them for financing, they are engaged in a phase of aeronautics; the Third, asserted derivatively on behalf of TWA, and the Fourth asserted by Toolco on its own behalf, re-allege facts set out in the First and Second and together with additional facts alleged, aver that the conduct in acquiring, maintaining and perpetuating control was in violation of the antitrust laws; and the Fifth alleges that the same course of conduct was in violation of Toolco's rights under the common law and the law of Delaware.

[10] References to "(R)" are to the pages of the Record in the District Court, which Record was filed with this Court on August 31, 1964 with the petition for certiorari filed on that date, No. 443.

[11] Subpoenas were not served on Breech and Tillinghast since, as officers of TWA, they were covered by the subpoena served on it.

served a notice for the deposition of Toolco by Hughes and moved for priority of discovery subject only to Toolco's completing the deposition of TWA then in progress. On March 5, 1962, the District Court (per Honorable Charles M. Metzner, to whom the case had been assigned for all purposes), entered an order denying the motion. Said order provided that Toolco might continue with the depositions theretofore scheduled which were then in progress, "limited, however, to evidence which bears on plaintiff's claims against Hughes Tool Company" (A87), and further provided that after such depositions were completed plaintiff TWA might commence its depositions; discovery by the additional defendants was deferred until completion of the depositions noticed by Toolco and TWA except that the additional defendants were given the privilege of participating in TWA's examinations if they chose to do so.

Although the right of the additional defendants to conduct depositions was deferred until after discovery by Toolco and TWA, the Special Master [12] granted a Rule 34 motion of the additional defendants for the production of documents by Toolco. Since Toolco was then required to produce documents to TWA anyway, it did not oppose the motion. Toolco produced over 125,000 documents to the additional defendants. It did not, however, produce certain documents consisting of confidential communications between attorney and client with respect to which Toolco asserted privilege nor its tax returns and confidential financial state-

[12] J. Lee Rankin, Esq., former Solicitor General of the United States, was appointed to act as Special Master to supervise the conduct of discovery by order of the District Court dated February 7, 1962 (R738-743).

ments for 1961 and 1962 which Toolco claimed were totally irrelevant to any issues in the litigation.[13]

Toolco did not subject the additional defendants to any discovery. By order of the District Court, enforced by the Special Master, the discovery proceedings by Toolco were confined exclusively to matters raised by TWA's complaint and Toolco was precluded from conducting discovery with respect to the counterclaims. Not one additional defendant was examined on deposition, nor was any witness examined with respect to the issues raised by the counterclaims. Although the additional defendants produced documents, the documents were those called for by subpoenas *duces tecum* served upon them before the counterclaims had been filed and related to the issues of the complaint. The additional defendants would have been obliged to produce these documents even if the counterclaims had never been filed.

The attendance by the additional defendants at the deposition being conducted by Toolco of TWA on the issues of the complaint was voluntary. Moreover, they did not cross-examine any of the persons deposed, but limited their participation in the proceedings to a series of procedural maneuvers.

(b) Toolco's Motion for a Stay

Following the decision of this Court on January 14, 1963 in *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (*"Panagra"*), Toolco on Feb-

[13] Toolco attempted to obtain interlocutory review from the Court of Appeals with respect to the District Court's direction that privileged documents be produced. However, its petition for a writ of mandamus was denied and on motion of the additional defendants its appeal from the production order was dismissed.

ruary 6, 1963 filed a complaint with the Civil Aeronautics Board (A145) which alleged that the conduct of the additional defendants in acquiring and exercising control over TWA was in violation of Sections 408, 409 and 411 of the Act. The complaint also alleged that the conduct of the additional defendants relating to TWA was inconsistent with the "public interest" within the meaning of the Act and therefore should not be approved by the Board. The complaint requested the Board to act promptly so as to permit Toolco to obtain effective relief from the District Court with respect to its counterclaims without undue delay.

In assuming jurisdiction over the complaint, the Bureau of Enforcement of the Board said:

> ". . . there are reasonable grounds to believe that certain provisions of the Act and requirements thereunder have been violated. . . ." (CAB Docket No. 14314, Petition for Enforcement, p. 3).

On February 6, 1963, and immediately after it filed its complaint with the Civil Aeronautics Board, Toolco moved the District Court for a stay of proceedings on the counterclaims pending a determination by the Board of the matters raised by Toolco's complaint before the Board or for such other and further relief as to the Court may seem just and proper (A263). The basis of Toolco's motion was that under the principles set forth in *Panagra* the Board had exclusive or primary jurisdiction with respect to controlling questions underlying the relief sought in the counterclaims.

On February 6, 1963, the District Court fixed February 18, 1963 as the date for oral argument on Tool-

co's stay motion. Prior thereto, the District Court had directed that plaintiff TWA might depose Hughes on February 11, 1963. By reason of the District Court's earlier orders, the additional defendants had been given the privilege of participating in the depositions to be conducted by TWA if they chose to do so. On February 8, 1963 Toolco filed a "Notice of Position" with respect to the proceedings on the complaint stating that it elected not to proceed with its defense of that case, but desired to test on appeal the merits of the legal position it had taken.[14] The District Judge then inquired as to whether Hughes would appear on February 11, 1963 for the purpose of being deposed by the additional defendants. Counsel for Toolco advised the District Court that Toolco intended to refrain from conducting or participating in any further proceedings on its counterclaims because Toolco believed that under *Panagra* it is a condition precedent to its obtaining relief on its counterclaims that the CAB determine that the conduct of the additional defendants was inconsistent with the public interest. The District Judge then said:

> "We might as well then consider the motion at this time for a stay of the proceedings on the counterclaims and deny that stay. . . ." (A195)

Immediately after the District Judge denied the motion for a stay, he advised counsel for TWA and

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[14] Toolco's motion to dismiss the complaint on grounds *inter alia* that the Civil Aeronautics Board had exclusive or primary jurisdiction over the transactions stated in the complaint was denied by the District Court. *Trans World Airlines* v. *Hughes*, 214 F. Supp. 106 (S.D.N.Y. 1963). This issue is now before this Court in the Petition for Certiorari filed by Toolco in No. 443. The District Court also ruled against Toolco on important discovery matters with respect to the complaint as is more fully set forth in Appendix D.

the additional defendants that he would entertain a motion under Rule 37 to dismiss the counterclaims (A196-197). Thereafter the motions to dismiss the counterclaims with prejudice were made and granted without any further hearings by the District Court. (A206). At the same time and under the circumstances more fully set forth in Appendix D, the District Court also granted a motion by TWA as plaintiff to impose sanctions under Rule 37 against Toolco and he ordered that a default judgment be entered subject to a hearing to determine damages.

The order of dismissal pursuant to which the judgments of dismissal were entered states that the motion of the additional defendants for a dismissal with prejudice is granted "For all of the reasons stated in the opinion and order entered on the companion motion by Trans World Airlines, Inc. . . ." (A206). However, the sole ground upon which TWA's motion was granted is that "the deposition of Hughes is essential for the proper presentation of TWA's case," 32 F.R.D. at 607, and that Hughes' failure to appear for deposition was a willful and deliberate default justifying the relief requested by TWA.[15] The opinion and order on TWA's motion makes no reference to the additional defendants, nor does it contain any finding with respect to the need of the additional defendants to examine Hughes.[16]

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[15] The District Court also stated that "Embraced within the refusal to proceed with the deposition of Hughes is the refusal to obey the orders of the court directing Toolco to produce the documents referred to above." 32 F.R.D. at 607.

[16] The Third Counterclaim asserted by Toolco derivatively on behalf of TWA was dismissed "with prejudice" without any notice to other stockholders pursuant to the provisions of Rule 23(c) Fed. R. Civ. P.

Thereafter, the judgments dismissing the counterclaims with prejudice were entered and Toolco appealed therefrom to the Court of Appeals.

The Court of Appeals affirmed the dismissal with prejudice of all but the Second Counterclaim, as to which it found the Board had exclusive jurisdiction, holding that Toolco had not been entitled to a stay and that Toolco's conduct in discovery (which related to proceedings on the complaint), justified the imposition of the most severe sanction available under Rule 37.

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

This case presents important unresolved constitutional issues relating to the due process limitations on the power of a district court to order the entry of a default judgment under Rule 37 of the Federal Rules of Civil Procedure. It also raises significant questions as to the standards and procedures a district court must follow in applying the most severe sanction of a default judgment for a failure to comply with a discovery order.

This Court, in its previous decisions, has clearly indicated that there are due process limitations on the power of a court to enter a default judgment. In *Hovey* v. *Elliott*, 167 U.S. 409, this Court held that a default judgment cannot be sustained under the due process requirements of the Constitution when it is entered for the purpose of punishing a party who has failed to comply with a pre-trial order.

This Court has held that a default judgment as a sanction for failure to comply with a discovery order is consistent with due process only if the failure to comply constitutes a reasonable basis for a presump-

tion that there is no merit in the defaulting party's case. In *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322, this Court found due process to have been preserved in the entry of a default judgment "on the reasoning that the State simply utilized a permissible presumption that the refusal to produce material evidence '. . . was an admission of want of merit in the asserted defense.'" (See *Societe Internationale* v. *Rogers*, 357 U.S. 197, 210, commenting and quoting from the *Hammond* case.) In contrast, in *Societe Internationale* v. *Rogers, supra*, this Court in reversing the entry of a default judgment, where the failure to comply with a discovery order was the result of the petitioner's inability to produce the documents demanded, stated that:

> ". . . The presumption utilized by the Court in the *Hammond* case might well falter under such circumstances. *Cf., Tot* v. *United States*, 319 U.S. 463. Certainly substantial constitutional questions are provoked by such action." (357 U.S. at 210).

The entry of a default judgment on the basis of a presumption that refusal to make discovery is an admission of want of merit also raises substantial constitutional issues under the circumstances presented in this case. These circumstances may be summarized as follows:

1. Toolco suspended proceedings on the counterclaims because it justifiably believed that under this Court's decision in *Panagra* which was decided while this case was pending in the District Court, the District Court was required to accord primary jurisdiction over the counterclaims to the Civil Aeronautics Board.

2. The default judgment was based on Toolco's conduct with respect to discovery on the complaint.

3. There was no finding that the evidence sought by deposition and discovery procedures was material.

4. A voluntary dismissal, instead of the stay expressly requested by Toolco, could have been entered without any prejudice to the additional counterclaim defendants.

Even if the entry of a default judgment under these circumstances were constitutionally permissible, it is an unduly and unreasonably harsh sanction. It represents such a departure "from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision" over the lower courts. Rule 19, Revised Rules of the Supreme Court of the United States.

A more detailed discussion of the circumstances which make the entry of a default judgment here violative of due process and an unreasonably harsh remedy follows.

1. Toolco's decision to suspend further proceeding on the counterclaims, resulting in the entry of the default judgment, can give rise to no adverse presumption as to the merits of its counterclaims. That decision was based upon Toolco's belief that the decision of this Court in *Panagra,* handed down in January 1963, required that Toolco obtain a determination by the Civil Aeronautics Board as to whether the acquisition and maintenance of control by the additional defendants over TWA met the public interest standards of the Act before it could prosecute its counterclaims. Accordingly, it promptly filed a complaint with the

CAB[17] and moved the District Court to stay proceedings on the counterclaims until after the CAB had taken final action on this complaint. This stay was denied (A 195).

The allegations of Toolco's counterclaims, all of which relate to a single course of conduct, constitute "precise ingredients" of the Board's regulatory authority in the "allowing or disallowing" of affiliations between persons engaged in a phase of aeronautics and an air carrier. (*Panagra*, 371 U.S. at 305; see § 408 of the Federal Aviation Act.) The acquisition and maintenance of control over TWA by the additional defendants, persons allegedly engaged in a phase of aeronautics, is at the core of each of the counterclaims. Accordingly, the Civil Aeronautics Board, under the decision of this Court in *Panagra*, had at least primary jurisdiction with respect thereto. A detailed discussion of the *Panagra* case is contained on pages 12 to 21 of the petition for certiorari Toolco has filed this Term in No. 443.

The Court of Appeals held that Toolco's Second Counterclaim, alleging that the conduct complained of constitutes a violation of § 408 of the Act, was within the exclusive jurisdiction of the Board. Approval by the Board under § 408 of the acquisition and maintenance of control over TWA by the additional defendants would exempt that conduct from the opera-

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[17] With respect to the allegation of Toolco's complaint before the Board, the Bureau of Enforcement of the CAB said:

"... there are reasonable grounds to believe that certain provisions of the Act and requirements thereunder have been violated. ..." (CAB Docket No. 14314, Petition for Enforcement, p. 3)

tion of the antitrust laws. See § 414 of the Act. In any event, therefore, the Board clearly had primary jurisdiction over those counterclaims which alleged that the acquisition and maintenance of control over TWA by the additional defendants violated the antitrust laws. See *Far East Conference* v. *United States*, 342 U.S. 570.

Even if, however, the allegations of the counterclaims were not within the primary jurisdiction of the CAB, Toolco's determination not to proceed with its counterclaims because it believed that the CAB had primary jurisdiction with respect thereto was not so unreasonable as to permit any presumption of want of merit to these counterclaims. Toolco was unwilling to run the risk that it might spend years litigating the antitrust issues raised by the counterclaims, only to discover that the District Court should have yielded jurisdiction to the CAB and not proceeded to entertain those claims. Clearly, no "admission of want of merit" in the claims which Toolco has asserted can be presumed from this conduct. See *Societe Internationale* v. *Rogers, supra*, 357 U.S. at 210.

2. The Court of Appeals affirmed the dismissal with prejudice of the counterclaims by reason of its finding that "Hughes' intransigence after intensive and expensive discovery proceedings already protracted for more than one year" (332 F.2d at 615) justified the imposition of the most severe sanction provided for in Rule 37. However, in reaching this conclusion the Court of Appeals relied upon Toolco's conduct in discovery relating to the complaint, and not upon any conduct of Toolco relating to the counterclaims since the year of discovery referred to by the Court of Appeals was discovery conducted with respect to the com-

plaint and no discovery had been conducted by Toolco with respect to the counterclaims. Furthermore, there was never a clear ruling by the District Court as to whether the additional counterclaim defendants, which had the right to participate in the examination of Hughes to be conducted by TWA on February 11, 1963, had, in the absence of such a deposition, an independent right to take Hughes' deposition on that date.

Regardless of the propriety of Toolco's conduct on the complaint, the deprivation of its property right in its counterclaims without a hearing on the merits by reason thereof raises a serious due process question. Indeed, if the matters contained in the counterclaims had been made the subject of a separate action, there is no question but that Toolco's conduct in the action brought against it by TWA could not justify the imposition of sanctions in that other action.

Nor has the District Court's action in entering a default judgment on the complaint been reviewed by the Court of Appeals.[18] However, if the default judgment on the complaint is ultimately reversed, Toolco's counterclaims will nevertheless be the subject of a final judgment dismissing them with prejudice even though it was determined that there was no justification for such a judgment.

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[18] The District Court certified its order entering default judgment on the complaint for an interlocutory appeal (32 F.R.D. at 608), but the Court of Appeals, in accepting the interlocutory appeal of the District Court's order, limited the appeal to questions relating to the jurisdiction of the District Court and the effect of the prior orders of the Civil Aeronautics Board, and refused to consider the propriety of the District Court's entry of a default judgment.

3. It is settled that only a "refusal to produce material evidence" can justify the entry of a default judgment. *Societe Internationale* v. *Rogers, supra,* 357 U.S. at 210. There is, however, no showing in this record, nor did the District Court make any finding, as to the materiality of the information sought to be obtained in the deposition of Mr. Hughes. The Court of Appeals in sustaining the default judgment stated that "the Hughes' deposition was absolutely essential to proper conduct of the litigation." (332 F.2d at 615). This statement finds, however, no support in the record, apart from mere assertions of counsel.

The entry of a default judgment absent detailed findings as to the materiality of evidence sought to be allowed by discovery is clearly contrary to the decision of the United States Court of Appeals for the District of Columbia Circuit in *Von Der Heydt* v. *Rogers,* 251 F.2d 17 (D.C.Cir. 1958). In *Von Der Heydt,* the District Court had dismissed a complaint upon defendant's application because plaintiff failed to comply with an order under Rule 34. Before dismissing the complaint, the District Court conducted hearings for nine days to determine, *inter alia,* the materiality of the records sought, and the circumstances surrounding plaintiff's failure to produce. Even on the basis of this record, however, the Court of Appeals found itself unable to determine whether the dismissal was justified and remanded the case to the District Court to make specific findings of fact and conclusions of law. Upon remand, the District Court made detailed findings including a finding that the documents called for were essential to a proper presentation of the defendant's case. Only on

the basis of a full and complete hearing and findings thereon under Rule 37 did the Court of Appeals feel that it had a sufficient record to enable it to determine that a dismissal would be justified under the circumstances there present. *Von Der Heydt* v. *Kennedy,* 299 F.2d 459 (1962), *cert. denied,* 370 U. S. 916.

The necessity of detailed findings as to materiality of the evidence sought is underscored by the fact that evidence may be material to only one of many defenses urged by the counterclaim defendants. If that were the case, a default judgment would clearly have been inappropriate, and the proper remedy would be to take as established against Toolco only the particular defense to which such evidence may be material.

Nor were any findings made by the District Court as to the availability of the information sought from Mr. Hughes from other sources of information, including Toolco, its officers and directors. It would seem clear that if such information is available elsewhere from other sources, the extreme remedy of a default judgment is inappropriate.

4. The most severe remedy of default judgment was applied in this case without consideration of the appropriateness of permitting a voluntary dismissal of the counterclaims. Such a dismissal would have been appropriate in the light of Toolco's request for a stay of all proceedings on the counterclaims pending action by the CAB or for "such other and further relief" as may be appropriate, and in the absence of any indication that such a voluntary dismissal could have resulted in any prejudice to the additional counterclaim defendants. The Court of Appeals, however, simply disposed of Toolco's contention that it was

entitled to a dismissal without prejudice by stating that Toolco never moved for a voluntary non-suit under Rule 41 of the Federal Rules of Civil Procedure. Actually Toolco never had an opportunity to make a specific request for a voluntary non-suit in the District Court.[19]

Under Rules 41(a)(1) and 41(c), Fed. R. Civ. P., a counterclaimant has an absolute right to a voluntary dismissal without prejudice any time up until service of a reply. It was not until after January 25, 1963 that any of the additional defendants filed a reply (See page 8, *infra*). Accordingly, up until January 25, 1963, Toolco had an absolute right as against all parties to the counterclaims to a voluntary dismissal under Rules 41(a)(1) and 41(c) of all of the counterclaims except the third,[20] and with respect to TWA and Tillinghast it had an absolute right to dismissal until February 11, 1963, which was subsequent to the day it moved for a stay. Nothing occurred in the eight business days between January 25 and February 6, 1963, the date the motion for a stay was made, which affected or prejudiced the rights or the position of the additional defendants in any respect.

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[19] Immediatley upon orally informing the court that it was Toolco's intention not to further prosecute its counterclaims until after CAB action, the District Court denied the stay from the bench and advised the additional defendants to move for a judgment of dismissal with prejudice. The subsequent filing of motion papers by the additional defendants was a mere formality, the motion in substance having been made and granted simultaneously with the denial of a stay.

[20] The Third Counterclaim is brought derivatively on behalf of TWA so that court approval and notice to other stockholders would appear to have been a condition precedent to dismissal under Rule 23(c).

Under Rule 41(a)(2) a claimant has the right to suspend proceedings on its claim or to obtain a voluntary non-suit when the pendency of the claim to the date of the request for the stay or dismissal has not caused undue prejudice to the defendant and where the stay or dismissal will not be legally prejudicial. See *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212, 217; *Klar* v. *Firestone Tire & Rubber Co.*, 14 F.R.D. 176 (S.D. N.Y. 1953).

At the time Toolco sought to suspend prosecution of its counterclaims, the additional defendants had in no respect been burdened or prejudiced by reason of the pendency of the counterclaims, except to the extent that the necessity of filing a reply to a pleading constitutes a burden. Discovery on the counterclaims had been deferred by order of Judge Metzner dated March 5, 1962 (A87) until after Toolco had completed its discovery with respect to the complaint of TWA and until after TWA had had an opportunity to conduct some discovery. At the time the suspension was sought, Toolco had not completed its discovery nor had TWA commenced any oral examinations, and the additional defendants had not been required to take any action with respect to the prosecution of the counterclaims.

II.

This case raises novel and important issues relating to the proper procedure for a district court to follow with respect to claims for damages arising out of a single course of conduct alleged to be in violation of the Federal Aviation Act, the antitrust laws, and the common law.

The Second Counterclaim alleged a violation of § 408 of the Federal Aviation Act. The Court of Appeals dismissed this counterclaim on the ground that "the Board clearly possesses exclusive jurisdiction. . . ." and that "the district court was without power to adjudicate this issue." (332 F.2d at 613). It appears, however, that if the Civil Aeronautics Board should find that § 408 has in fact been violated Toolco would be entitled to damages. See *Fitzgerald* v. *Pan American World Airways*, 229 F.2d 499 (2d Cir. 1956). See also *J. I. Case Co.* v. *Borak*, 377 U.S. 421 (1964).

The proper procedure consistent with the decisions of this Court in *Hewitt-Robbins, Inc.* v. *Eastern Freightways, Inc.*, 371 U.S. 84, and in *Panagra*, 371 U.S. at 313, n. 19, would have been for the court to hold the Second Counterclaim in abeyance pending action by the Board rather than to dismiss it for lack of jurisdiction. Moreover, since the same acts charged in the Second Counterclaim are also the subject of the other counterclaims, proceedings on all counterclaims should have been stayed, as Toolco requested, pending a final decision by the Board. Such a stay would have been consistent with the requirement that a person aggrieved by a single course of action must seek in one action all the relief to which he is entitled. See, *e.g.*, *Macris* v. *Sociedad Maritima San Nicolas, S.A.*, 271 F.2d 956 (2d Cir. 1959), *cert. denied*, 362 U.S. 935; *cf.* Rule 13(a).

CONCLUSION

For the reasons stated the writ should be granted.

Respectfully submitted,

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